Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, *et al.*,

Petitioners,

—v.—

JANE DOE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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IN THE
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No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, et al.

Petitioners,

v.

JANE DOE, et al.,

Respondents.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

For the reasons stated below, the Petition for a Writ of Certiorari should be denied.

OPINION BELOW

The opinion of the New Jersey Supreme Court is reported at 71 N.J.478 (1976). The trial court's order following such opinion was entered on January 10, 1976 and is attached hereto.

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. § 1257 (3) (PW 1) 1/ However, that jurisdictional basis is inapplicable here, where the federal questions proposed by Petitioners were neither presented to nor decided by the New Jersey Supreme Court, and that Court's decision was based on independent state grounds.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction over questions which were neither presented to nor passed upon by state courts below?

2. Should this Court take jurisdiction in this case in view of its well-settled policy to deny review of decisions by a state court resting on independent and wholly adequate state grounds?

1/ References designated "PW" and followed by numerals refer to pages of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Respondents, Jane Doe, Mary Roe and their doctors, Edward S. Milner and Calvin Hahn, instituted an action seeking to invalidate Petitioner hospitals' regulations prohibiting elective abortions at the hospitals' facilities. The trial court dismissed the complaint, and Respondents appealed to the intermediate appellate court. During the pendency of the appeal, the Supreme Court of New Jersey took jurisdiction of the appeal by certification (69 N.J. 85) and reversed, on state grounds, the trial court's ruling. (PW App. A5-A12) 2/

Respondents made two claims in state court as to the invalidity of Petitioners' regulations: 1) the "non-constitutional rationale was that the hospitals, as quasi-public institutions, owed an obligation to the public, including the plaintiffs [Respondents], to make their facilities available; that the defendants [Petitioners] had violated that duty by establishing arbitrary and

2/ References designated "PW App.A" and followed by numerals refer to pages of the New Jersey Supreme Court opinion included in the appendix to the Petition for Writ of Certiorari.

unreasonable rules prohibiting elective abortions; that these rules were reviewable by the Court, and should be declared null and void" (PW App. A3); and 2) that Petitioners' activities were so imbued with state action as to lose their private character. (PW App. A2, A3)

The New Jersey Supreme Court never reached the question of whether Petitioners' rules constituted state action. Basing its decision solely on state grounds, the Court ruled that, under New Jersey statutes and case law, Petitioners were quasi-public institutions, with a duty to make their facilities available to the public and not to promulgate policies unrelated to medical care or public welfare. (PW App. A10) The Court held that the hospitals' regulations prohibiting elective abortions neither furthered medical standards nor served to make hospital facilities available for the care and treatment of the public. (PW App. A10, A11) In support of its ruling that the Court could declare rules of a quasi-public institution to be arbitrary and unreasonable, the Court reviewed and analyzed New Jersey statutes and case law confirming the status of New Jersey hospitals as quasi-public institutions and the power of New Jersey courts to review their rules. (PW App. A5-A10)

Following the New Jersey Supreme Court's decision, an order was entered on January 10, 1977 in the Superior Court of Cumberland County, New Jersey, stating, in pertinent part, as follows: "the Supreme Court [of New Jersey] having held that the policies of defendants herein prohibiting staff physicians from using the Bridgeton Hospital, Newcomb Hospital and Salem County Memorial Hospital facilities for elective abortions contravene the law of this state..it is..ORDERED that the aforesaid policies of defendants relating to elective abortions are declared contrary to New Jersey law..." (App. 1A-2A) This order is the judgment referred to by Petitioners in attempting to invoke the jurisdiction of this Court. (PW 1)

Petitioners never raised in state court the questions presented by them to this Court. Their contention there was simply "that they were private non-profit hospitals governed by their respective boards of trustees and that they had the absolute right to determine who should use their facilities and whether elective abortions should be permitted." (PW App. A3) The questions presented by Petitioners to this Court were not passed upon by the New Jersey Supreme Court.

Petitioners failed to comply with

Rule 23 1(f) of the Supreme Court Rules which requires that the Petition for Writ of Certiorari indicate the stage at and manner in which any federal questions were raised and the manner in which they were passed upon by the state court.

Respondents oppose the granting of certiorari in this cause because the questions proposed by Petitioners were neither presented to nor passed upon by the New Jersey Supreme Court, and that Court based its ruling solely on an adequate and independent state ground without reaching or ruling on any federal question.

ARGUMENT

I. THE QUESTIONS SOUGHT TO BE REVIEWED WERE NEVER RAISED OR PASSED UPON IN STATE COURTS BELOW AND, THEREFORE, ARE FORECLOSED FROM REVIEW BY THIS COURT.

The questions presented by Petitioner for review are as follows:

> 1. Is there a constitutional right to a "voluntary abortion" that may be asserted against a private hospital,as the court below held, or is there only a constitutional right not to have the State

> foreclose the performance of such abortions, as this Court has held?
>
> 2. Is it a violation of the Due Process Clause of the Fourteenth Amendment for a state court to compel the use of private hospitals to perform "voluntary abortions" on demand, contrary to the policies established by the governing bodies of these private hospitals? (PW 2)

In order to invoke the jurisdiction of this Court under 28 U.S.C.§1257 (3), Petitioners must establish in their petition that these questions were both presented to and passed upon by the New Jersey Supreme Court. Respondents submit that Petitioners have not, and cannot properly, establish these prerequisites, and that the sole and independent federal question presented below was never decided by the New Jersey Supreme Court.

In construing 28 U.S.C. §1257, this Court has long ruled that it has no jurisdiction over cases in which a federal question was not both raised and

passed upon below. Huffman v. Pursue, 420 U.S. 603 (1975), reh. den. 421 U.S. 971 (1975); Street v. New York, 394 U.S. 576 (1969); Cardinale v. Louisiana, 394 U.S. 437 (1969); Williams v. Kaiser, 323 U.S. 471 (1954); Southwestern Bell Telegraph Co. v. Oklahoma, 303 U.S. 206 (1938). In Cardinale v. Louisiana, supra, this Court indicated that, in addition to the jurisdictional requirements of 28 U.S.C. §1257, there are "sound reasons" for the Court's refusal to decide federal questions which were not raised or passed upon below.

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with these questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenges, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked on an adequate state ground. Even though States are not free

> to avoid constitutional issues on adequate state grounds [citation omitted], they should be given the first opportunity to consider them. 394 U.S. at 439.

Applying the holdings and rationale of these cases, the Court should not take jurisdiction over the instant case.

Petitioners have not asserted, nor could they properly do so, that they raised their federal questions before the lower courts. The only federal question presented below was raised by Respondents and is substantially different from those presented to this Court by Petitioners. That question was whether Petitioners' refusal to allow elective abortions constituted state action because of the federal, state, county and municipal aid received by them. That question was never reached by the New Jersey Supreme Court. The Court instead ruled on Respondents' alternative assertion that, under New Jersey law, Petitioners had an obligation as quasi-public institutions to make their facilities available to the public, and that Petitioners' rules prohibiting elective abortions were arbitrary and unreasonable.

Moreover, contrary to Petitioners' assertion in the first question presented, the Court never ruled that there was "a constitutional right to a voluntary abortion that may be asserted against a private hospital." (PW 2) Rather, the Court ruled that Petitioner hospitals are "quasi-public institutions whose actions must not contravene the public interest...Recognition by the Legislature of the special status of the hospital is consonant with its public nature and responsibilities. Judicial review and legislative control are predicated on recognition of the quasi-public status of the hospital and its obligation to serve the public." (PW App. A8) The Court then held Petitioners' rules invalid stating:

> The hospital rule or regulation should be related to the hospital's purposes and operational needs. Davis v. Morristown Memorial Hospital, 106 N.J. Super. 33, 43 (Ch. Div. 1969). Moral concepts cannot be the basis of a non-sectarian non-profit eleemosynary hospital's regulations where that hospital is holding out the use of its facilities to the general public. The board of trustees, although vested with managerial discretion within the framework of the hospital's functions and purposes, may not promulgate unrelated policies. When it does so, its determinations are unsupportable and arbitrary. Guerrero v. Burlington County Memorial Hospital, 70 N.J. 344, 256-357 (1976). (PW App. A10)

The Court thus ruled that, in light of New Jersey statutes and case law, Petitioners were under a duty to serve the public good, and that their rules prohibiting elective abortions did not serve this public purpose.

That the questions presented by Petitioners to this Court were not ruled upon by the New Jersey Supreme Court is made clear by the judgment and order of the trial court following the Supreme Court's decision, attached hereto. (App. 2A)That order reaffirms that the New Jersey Supreme Court's decision was a ruling on state, not federal, questions.

Further, because Petitioners did not present their federal questions to the New Jersey courts, nor were they

ruled upon, Petitioners could not and did not comply with Rule 23 1 (f) of the Supreme Court Rules. This rule requires that Petitioner indicate the stage at and manner in which any federal claims were raised and the way the same were passed upon by the state court. Petitioners' claim below, limited to an assertion of their private character and absolute discretion to establish governing rules and regulations, did not raise the federal claims they now seek to have reviewed. In light of both this claim and the substance of the lower court's ruling, Petitioners' inability to comply with Rule 23 is understandable.

II. NO FEDERAL QUESTION IS PRESENTED TO THIS COURT SINCE THE NEW JERSEY SUPREME COURT DECISION RESTS SOLELY ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This case clearly presents the question of whether or not the United States Supreme Court will substitute its view for that of the highest New Jersey state court as to the manner in which state law should be construed.

The decision of the New Jersey Supreme Court was based solely on state grounds. As discussed in Point I of this Brief, the Court eschewed ruling as to constitutional contentions in determining that Petitioners' regulations

prohibiting elective abortions were arbitrary and unreasonable. In deciding that Petitioners were quasi-public institutions, whose rules and regulations were subject to judicial scrutiny, the Court relied on Greisman v. Newcomb Hospital, 40 N.J. 389 (1963) and the network of New Jersey statutes governing the activities of hospitals. (PW App. A6-A8) Greisman established, as a matter of state common law, judicial review of hospital policies in the context of staff privileges. In reviewing Greisman, the Court stated that:

> Although Greisman, supra,dealt with the right of a doctor to apply for admission to the hospital staff and involved the somewhat monopolistic control over the rights of a doctor to practice medi:ine at a given location, the underlying principle rests...on a much broader basis, the obligation of a quasi-public entity to serve the public... The hospital trustees' managerial powers were deeply embedded in public aspects and, as fiduciary powers, had to be exercised reasonably and for the public good. (PW App. A7)

The Court further established the fiduciary relationship between the public and the hospitals by citing portions of the New Jersey Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq. and supporting regulations, N.J.A.C. 8:33-1.1 et seq. (PW App. A8)

Analogizing the regulation of hospitals to that of inns and common carriers, the Court cited both New Jersey and English case law for the proposition that there must be "a rational relationship, a causal nexus, between the reasons for the refusal" (PW App. A9) of services and the function of the institution. This analogy was in keeping with the Court's previous analysis of state law not only in Greisman, but also in Davis v. Morristown, 106 N.J. Super. 33 (Ch. Div. 1969) and Guerrero v. Burlington County Memorial, 70 N.J. 344 (1976).(PW App. A9,A10) The Court concluded that neither medical standards nor operational needs of the hospitals would warrant denial of facilities of "a non-sectarian hospital, whose basic purpose is to make available hospital facilities for the care and treatment of the public." (PW App. A11)

The adequacy of the above state grounds cannot and have not been challenged by Petitioners, and it is a well-settled principle that this Court will

not review a state court judgment based on independent and adequate state grounds. Cousins v. Wigoda, 419 U.S. 477 (1975); Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1961); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). The rationale for this position is clear.

> The reason[for the adequate state ground rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion...
> Herb v. Pitcairn, 324 U.S. 117 (1945) cited with approval in Fay v. Noia, 372 U.S. 391 (1963)

The independent and adequate state ground relied upon by the New Jersey Supreme Court is not transformed into a federal question by a passing reference to a federal constitutional right. Petitioners attempt to do precisely this by their statement that "[t]he New Jersey Supreme Court held that, because private hospitals are corporations affected with a public interest, and because the ['] federal constitutional right to an abortion is now well settled ['] Opinion, p. 15, (PW App. A11) their obligations are, in effect, the same as that of a state hospital in this regard." (PW 3) Petitioners' statement is a misleading and incorrect reading of the New Jersey Supreme Court's ruling. As discussed previously, the Court chose to rule solely on the basis of the non-constitutional issue presented to it, and thus its ruling differs from Petitioners' characterization. The Court's reference to "the federal constitutional right to an abortion during the first trimester" (PW App. A11) and its citation to Roe v. Wade, 410 U.S. 113 (1973), reh. den. 410 U.S. 959 (1973) (PW App. A11, 12) merely arose in the context of construction of a state statute.

Petitioners have not challenged the validity of the statute construed by the New Jersey Supreme Court, nor have they even challenged the Court's

construction of the statute. Since this Court is generally bound by the highest state court's construction of a state statute, Wainwright v. Stone, 414 U.S.21 (1973),certainly the Court can take no different position where the validity and construction of the statute are not even in question. A mere reference to a federal constitutional right in the course of the Court's attempt to uphold the validity of the state statute does not create a federal question.

Finally, Petitioners' comparison between the New Jersey Supreme Court's decision in the instant case and the decisions in Doe v. Bellin Memorial Hospital, 479 F. 2d 756 (7th Cir. 1973) and Greco v. Orange Memorial Hospital, 513 F. 2d 873 (5th Cir. 1975) is inapposite. In neither of those cases is there even a hint of the non-federal grounds relied upon by the New Jersey Supreme Court. Both deal exclusively with the issue of whether the governmental involvement in the activities of defendant hospitals rendered their anti-elective abortion regulations state action, contrary to 42 U.S.C. §1983 and the Fourteenth Amendment. This was precisely the federal question not resolved by the New Jersey Supreme Court. The Court instead chose to rely exclusively on an interpretation of state law.

CONCLUSION

For the reasons cited above, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

APPENDIX

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-CUMBERLAND COUNTY

DOCKET NO.

JANE DOE, et al.,

Plaintiffs,

v.

BRIDGETON HOSPITAL ASSOCIATION, INC., et al,

Defendants.

Civil Action
ORDER

This matter having been considered by the Supreme Court of New Jersey on certification pursuant to R.2:12-1 and the Supreme Court having held that the policies of defendants herein prohibiting staff physicians from using the Bridgeton Hospital, Newcomb Hospital and Salem County Memorial Hospital facilities for elective abortions contravene

the law of this state;

And the Supreme Court having held further that as a matter of statutory interpretation, N.J.S.A. 2A:65A-1 et seq. does not apply to the defendant hospitals, and the Supreme Court having therefore reversed the earlier judgment of this Court in this matter, and remanded the matter for entry of an order consistent with its opinion, and good cause appearing therefor, it is this 10th day of January 1977

ORDERED that the aforesaid policies of defendants relating to elective abortions are declared to be contrary to New Jersey law; and it is further

ORDERED that defendants, their agents and all persons acting in concert with them are and shall be enjoined from adopting, implementing and/or enforcing the aforesaid policies relating to elective abortions and/or any policy or practice which prohibts or limits or denies hospital facilities and assistance for the performance of elective abortions by physicians holding staff privileges at the defendant hospitals for any reason unrelated to the medical needs of the patients served by the defendant hospitals or which although related to the medical needs of the patients served by defendant hospitals,

imposes more stringent limitations on the performance of elective abortions than are imposed on the performance of medically comparable procedures, or in any other discriminates against doctors seeking to perform and patients seeking to obtain elective abortions.

/S/_____
GEORGE B. FRANCIS J.S.C.